No. 14-275

In the Supreme Court of the United States

Supreme Court, U.S.
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MARVIN D. HORNE, et al.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BAYLEN J. LINNEKIN AND KEEP FOOD LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Baylen J. Linnekin is the founder and executive director of Keep Food Legal Foundation. He serves as an adjunct faculty member at George Mason University Law School, where he teaches a Food Law & Policy Seminar and American University, where he teaches courses on food policy. Linnekin is currently writing his first book, which focuses on ways that government policies often impact sustainable food practices, for Island Press. He is also currently serving as an expert witness in an ongoing First Amendment food-labeling lawsuit.

Linnekin's scholarly research frequently reveals and discusses the historical origins of rights we enjoy as Americans—particularly as they relate to historical protections and/or violations of rights in food. As described below, the Takings Clause, which is at the heart of the questions presented in the instant case, has its origins in protecting individuals against governmental takings of food.

Linnekin's scholarly writings have appeared in many scholarly publications, including the *Wisconsin Law Review*, *Hastings Constitutional Law Quarterly*, *Chapman University Law Review*, *Northeastern University Law Journal*, *Oxford Encyclopedia of Food and Drink in America*, *Routledge International Handbook of Food Studies*,

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Besides *amici curiae* and their counsel, no party has made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief.

and elsewhere. Linnekin has presented his scholarly research at Harvard Law School, Yale Law School, University of Chicago Law School, Duke Law School, Tulane Law School, Pepperdine Law School, University of Kentucky Law School, and many other top law schools and universities.

Linnekin's opinion pieces on food and law have been published by the *New York Post*, *Baltimore Sun*, Huffington Post, and many others. He has offered expert commentary on BBC Radio, Fox Business Channel, and dozens of other radio and TV programs and has been quoted by the *Wall Street Journal*, *Washington Post*, *Los Angeles Times*, *Politico*, *Wilson Quarterly*, *ABA Journal*, Reuters, and many others.

Linnekin earned an LL.M. in agricultural and food law from the University of Arkansas School of Law, a J.D. from Washington College of Law, an M.A. in learning sciences from Northwestern University, and a B.A. in sociology from American University.

Amicus Keep Food Legal Foundation is a Washington, DC-based 501(c)(3) nonprofit established in 2012 that promotes food freedom—the right of every American to grow, raise, produce, buy, sell, share, cook, eat, and drink the foods of their own choosing. Keep Food Legal Foundation's work serves to educate the American public and the legal community about the historical origins and current exercise of rights as pertains to food. Those rights—specifically, those enumerated in the Fifth Amendment's Takings Clause—and their history are at issue in the instant case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals erred when it determined that the raisin Marketing Order program does not produce a violation of the Takings Clause. The Ninth Circuit's decision runs afoul not just of the historical origins of the Takings Clause, which arose largely out of an effort to protect personal property rights in food, but also contradicts decisions made by this Court and other federal courts.

The Takings Clause of the Fifth Amendment of the U.S. Constitution protects Americans against governmental takings of private property.[2] The protections guaranteed by the clause mean government may only take private property for public use, and must in such instances provide just compensation to a property owner.

The Takings Clause traces its origins to two key precepts of English law. While Magna Carta gave rise to the compensation principle in 1215, a key 1606 legal case established the public use principle. "The underlying concept of the Fifth Amendment had been recognized in England as early as 1215 with the signing of the Magna Carta. One of the earliest eminent domain cases in England, known as the *Saltpetre* case, confirmed this principle[.]" Dean Allen Floyd II, *Irrational Basis: The Supreme Court, Inner Cities, & the New*

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[2] U.S. CONST. amend. V, cl. 4. ("[N]or shall private property be taken for public use, without just compensation.").

"Manifest Destiny," 23 Harv. BlackLetter L.J. 55, 66 n.90 (2007).

The relevant language and substance of these canons served to establish and protect personal property rights in food. Protection of such rights preceded similar recognition of real property rights both in England and in the American colonies where, in 1641, Massachusetts established the first protection against uncompensated takings (of cattle and other personal property).

In the years prior to and during the American Revolution, the British increasingly violated the colonists' personal property rights in food. James Madison drafted the Takings Clause in order to protect the property rights of Americans by preventing the government from engaging in any such future abuses.

The essential food-related origins of the Takings Clause suggest that courts should interpret the Takings Clause most broadly in cases where the government takes personal property, particularly food. In such cases, courts should afford those subject to government takings the full power of the Takings Clause.

The Ninth Circuit ignored this Court's Takings' Clause jurisprudence and erred when it applied the *Nollan/Dolan* analysis to the Hornes' raisins. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1143-44 (9th Cir. 2014) *cert. granted sub nom. Horne v. Dep't of Agric.*, No. 14-275, 2015 WL 213643 (U.S. Jan. 16, 2015). Analysis of the Marketing Order under the framework provided in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) is most appropriate because the Marketing Order effectively allows the Secretary to seize the

raisins or fine the handler, essentially taking from the handler either the literal fruits of his labor or—in the form of fines—the figurative fruits of that labor.

ARGUMENT

THE ORIGINS OF THE FIFTH AMENDMENT'S TAKINGS CLAUSE IN THE PROTECTION OF FOOD AS PERSONAL PROPERTY REQUIRES THE GOVERNMENT TO COMPENSATE PETITIONERS.

A. The Need to Protect Against Uncompensated Takings of Food Established the Basis of Protecting Property Rights in England

1. Magna Carta, the compensation principle, and the protection of personal property rights in food

Magna Carta, the English charter of individual rights, adopted in 1215, established that a taking of personal property by the King was only just when accompanied by fair and immediate compensation. This is the first known expression in law of such a principle. *See* James Ely, Jr., *"That Due Satisfaction May Be Made:" The Fifth Amendment & the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1, 15 (1992) ("The right to an indemnity when property was taken can be traced to Magna Carta[.]").

Specifically, Magna Carta prohibited any officer acting on behalf of the King from taking personal property—including, specifically, corn—from a property owner without providing immediate

compensation.[3] *Magna Carta* ch. 28 (1215) ("No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.").

The King could take food because it was part of his recognized purveyance. *See, e.g.*, 1 William Blackstone, *Commentaries* *287 (defining purveyance as "a right enjoyed by the crown of buying up provisions and other necessaries... for the use of his royal household, at an appraised valuation, in preference to all others, and even without the consent of the owners"). The purveyance was essential for the King, who often traveled between his properties and who, without relying on this mandate to his subjects, might otherwise have gone hungry. William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* 329 (1914) (noting the King "move[d] constantly" and that "difficulties must have been great of finding sufficient food"). But Magna Carta commanded he could not take food from any subject without paying the property owner immediately.

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[3] The term "corn" here refers generally to grains, as corn was unknown to Europeans and would remain so until the discovery of the New World hundreds of years later. *See* Peter Barton Hutt & Peter Barton Hutt II, *A History of Government Regulation of Adulteration and Misbranding of Food*, 39 FOOD DRUG COSM. L.J. 2, 3 n.6 (1984) ("As used here and in other early sources, 'corn' probably refers to grain in general.").

2. The Saltpetre Case, *the public use requirement, and growth of personal property rights in food*

The Case of the King's Prerogative in Saltpetre[4] centers on a traditional food ingredient. Saltpetre is a naturally occurring compound made from decaying organic matter, and is often found in barns.[5] Saltpetre has been used for centuries to cure and brine food. *See, e.g.*, T. Williams, *The Accomplished Housekeeper, and Universal Cook* 228-33 (1797) (noting the necessary use of saltpetre in curing hams, tongue, bacon, beef, and various other foods); Fergus Henderson, *The Whole Beast: Nose to Tail Eating* 76 (2004) (finding saltpetre "a little too ferocious" for his palate, the renowned modern English nose-to-tail chef and cookbook author recommends brining instead in sea salt).

The King valued saltpetre for its other use: as a key component in gunpowder,[6] which just the year before this court's decision had been used in a plot to blow up Parliament. *See, e.g.*, Philip Sidney, *A History of the Gunpowder Plot* (1905). The *Saltpetre Case* established the King's authority to empower his

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[4] 12 Co. Rep. 15, 77 Eng. Rep. 1294 (1606) (K.B.) [hereinafter the *Saltpetre Case*].

[5] Saltpetre is potassium nitrate. *Webster's New Collegiate Dictionary* 1039 (9th ed. 1989). Saltpetre is formed through the decay of organic matter like manure. *See* Paul Forchheimer, *The Etymology of Saltpetre*, 67 Modern Lang. Notes 103, 103-04 (1952).

[6] *See* the *Saltpetre Case* at 1297 (holding that the Crown could take saltpetre for making gunpowder so long as it did so in service of defending the realm).

servants to dig for saltpetre on private property. "[T]his taking of saltpetre is a purveyance of it for the making of gunpowder for the necessary defence and safety of the realm." *The Saltpetre Case* at 1295.

The *Saltpetre Case* made no provision for compensating a property owner subject to a taking of saltpetre.[7] But the case protected an individual's personal property rights in their food by setting strict limits on the scope of the King's servants' ability to take saltpetre. First, the case buttressed a property owner's simultaneous right to dig for and use saltpetre on his own land. "The owner of the land cannot be restrained from digging and taking saltpetre." *Id.* at 1295. The court stated the alternative would deny the property owner "the commodity of his own land." *Id.* at 1296.

Second, the court barred the King's servants from using saltpetre for any culinary purposes, stating that saltpetre dug and taken from a property owner "cannot be converted to any other use than for the defence of the realm. for which purpose only the law gave the King this prerogative[.]" *Id.* at 1295. Third, the court restricted where the King's servants could dig for saltpetre, and specified they could not dig for it in any immediate area where other food was stored. "The King's servants cannot undermine or impair any walls or foundation of any houses of any nature; nor can they dig in the floor of the mansion-house for saltpetre; nor can they dig in the

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[7] The necessity of defending the realm made this the *Saltpetre Case* an exception to the general compensation rule established in Magna Carta.

floor of any barn for the custody of corn, hay, &c[.]" *Id.*

So important was the prohibition on impairing an individual's personal property rights in food that the court again stated that the King's servants could not "dig the floor of any barn employed for the safe custody of any corn[.]" *Id.* at 1294. And while the court permitted the King's servants to dig in larger spaces where food was stored, it did so only insofar as "sufficient room for the necessaries of the owner [existed]" and so long as any "wine, beer, and other necessary provision of the owner be not removed, or in any sort impaired."[8] *Id.* at 1296. The court also required the King's servants to "repair" any damaged property "in convenient time, in so good plight as it was before[.]" *Id.*

History shows the King's servants often failed to heed these requirements. *See* Thomas B. Nachbar, *Monopoly, Mercantilism, & the Politics of Regulation*, 91 Va. L. Rev. 1313, 1344 n.144 (2005) (noting public scorn directed at the King's saltpetre servants); Unsigned, *The Saltpetre Man*, N.Y. Times, Nov. 12, 1899 (listing the abuses of the King's "hated.... saltpetre men," from whom "no householder was free from their visits," who rarely obeyed takings rules, who unjustly requisitioned animals for carting away their takings, and who generally abused property rights to such an extent that these servants were "one of the factors in the national irritation which made the [English] civil war possible"). Still, the

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[8] Notably, the case declared a property owner's wine—which, like raisins, is an agricultural product made by aging grapes—could not be taken by the King's servants under any circumstances.

Saltpetre Case's protection of personal property rights in food was part of the growing recognition of property rights that arose toward the end of feudalism. *See* Joseph H. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 53 (1999) (noting that rights in and protections of property arose at the end of the feudal era). Like the English themselves, the establishment of personal property rights in food would soon secure a beachhead in the New World.

3. Blackstone recognized key links between agriculture, society, and personal property rights in food

England's most influential and widely published legal scholar during the Founding Era, Sir William Blackstone, recognized the importance of establishing personal property rights in livestock animals as a means of establishing a stable agricultural society.

> The article of food was a more immediate call, and therefore a more early consideration. Such, as were not contented with the spontaneous product of the earth, fought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals... and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner[.] 2 William Blackstone, *Commentaries* *5.

Blackstone also recognized the importance of the compensation principle. "But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained." 1 William Blackstone, *Commentaries* *139. Blackstone cited no authority for his discussion of the compensation principle. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 786 n.15 (1995). But Blackstone, who wrote the first scholarly work on Magna Carta, knew its origins better than did anyone. *See* William Blackstone, *The Great Charter and Charter of the Forest, with Other Authentic Instruments* (1759). And he was no doubt familiar with the case that had established the public use principle. *See* 4 William Blackstone, *Commentaries* *159 (referencing the King's saltpetre men).

B. America's First Colonists Protected Personal Property Rights in Food

1. Personal property rights in food codified in 1641

Personal property rights in food, including the proscription against uncompensated takings, were quick to find a home in Britain's American colonies. In 1641, shortly after the Massachusetts Bay Colony was settled, the colony adopted a declaration of liberties, which contains the first colonial takings law. The law barred takings of cattle and other goods for public use without a court order, required

payment for the taking, and mandated compensation in the event a cow or goods were damaged or destroyed.

> No mans Cattel or goods of what kind soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompenced." Massachusetts Body of Liberties 8 (1641), *reprinted in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 148, 149 (Richard L. Perry & John C. Cooper eds., 1952) (original spelling and grammar preserved).

The compensation principle evident in the Massachusetts Body of Liberties comes from Magna Carta. *See* Treanor at n.12 ("This provision of the Body of Liberties appears to have been model[]ed on Article 28 of Magna Carta[.]") The public use principle—along with provision for the consideration of damage to property—appears for two key reasons to be taken from the *Saltpetre Case*. First, the case was widely known, thanks to the limits it had established on the King's feared saltpetre men. Second, the author of the Massachusetts Body of Liberties, Nathaniel Ward, began practicing law in England one year after the *Saltpetre Case* was decided, and would certainly have been familiar with

the case. *See* New England Historical Society, *The New England Historical and Genealogical Register* 325 (1889) (noting Ward's admission to one of London's Inns of Court in 1607).

It is noteworthy that the Massachusetts Body of Liberties, this first proscription against takings in the colonies, pertained solely "to the seizure of personal property"—including, expressly, an animal used for food, cattle—rather than to real property. *See* Treanor at 784. Like Magna Carta and the *Saltpetre Case* before it, Massachusetts had recognized personal property rights in food that acted as a bulwark against food-related takings.

During much of America's pre-Revolutionary history, the English honored the principle that just takings required compensation. *See* Ely at 4. But in the years leading up to and including the Revolutionary War, British troops systematically subjected American colonists to regular and increasingly harsh food laws. They did so first through a series of unprecedented regulations.

The Sugar Act of 1764[9] was an entirely new sort of law in that it "involved the principle of the direct taxation of the colonies for imperial purposes." Oliver M. Dickerson, *The Navigation Acts and the American Revolution* 186 (1951). The Act, which spurred cries of "taxation without representation," imposed "so high a duty on all foreign sugar, melasses (sic), and rum" that it served to ban these extremely popular products. Stephen Hopkins, An Essay on the Trade of the Northern Colonies, Newport Mercury, Feb. 6, 1764, *reprinted in Tracts of*

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[9] 4 Geo. III c. 15.

the Revolution 1763-1776 3, 15 (Merrill Jensen ed., 1967). It also served to ban wine. *See* Dickerson at 177 (noting the Act "practically terminated the American distributing trade in wine and transferred much of it to the British wine merchants"). The Sugar Act was followed in short order by the Tea Act (which undercut American tea merchants and smugglers);[10] Quartering Acts (which required colonists to house and provide specific enumerated foods to British troops);[11] and Fisheries Act (which took from New England fishermen the right to fish in rich North Atlantic waters).[12]

These provocations helped push the colonists to make war against the British, a war that began in Lexington and Concord before word of the Fisheries Act had even reached American shores in 1776. Even as the first shots of the Revolutionary War still rung, the British had begun a new campaign of violating the colonists' property rights in food. In fact, within hours of the initial battle of the Revolution at Lexington and Concord, British troops descended on the Munroe Tavern in Concord. *See* Elise Lathrop, *Early American Inns & Taverns* 81–82 (1917). Its proprietor, Mrs. William Munroe, wife of an American militia colonel, buried her family silver near a tree and fled the house shortly before the troops' arrival. *Id.* at 82. When the British arrived, they ate bread Mrs. Munroe "had baked that morning." *Id.* They also killed her sister's cow and

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[10] 13 Geo. III c. 44.

[11] 7 Geo. III c. 59; 14 Geo. III c. 54.

[12] 15 Geo. III c. 31.

forced her sister to feed an injured British soldier who the troops had quartered in her house. *Id.*

Similar uncompensated takings by the British would continue throughout the Revolutionary War, as the case of *Respublica v. Sparhawk* demonstrates.[13] It was no surprise, then, that when Thomas Jefferson wrote the Declaration of Independence, he saw it necessary to include in the document's grievances explicit mentions of British assaults on Americans' personal property rights in food. The Declaration of Independence harangues the King for permitting his troops to "eat out the[] substance" of colonists barns and cupboards, and chides the King for "plunder[ing] our seas." *The Declaration of Independence* (U.S. 1776).

In stark contrast to the actions of the British, many colonial legislatures sought to recognize and protect the personal property rights in food of their fellow Americans by passing laws to compensate colonists for food taken by hungry American troops. Ely at 13. ("Virginia empowered officials to take beef, pork, bacon, and salt for use by troops upon 'paying or tendering to the owner the price so estimated by the appraisers.'") South Carolina passed a law similar to Virginia's in 1779. *Id.* The compensation principle also spread to state constitutions. Both Vermont and Massachusetts enshrined the compensation principle in their respective state constitutions during the American Revolution. *Id.* at 15.

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[13] 1 U.S. (1 Dall.) 357 (1788) (taking of flour during wartime by British troops).

2. From personal property rights in food to the Fifth Amendment's Takings Clause

Courts often turn to the Declaration of Independence and the Bill of Rights—the wellspring and protector of Americans' enumerated and unenumerated rights—to answer questions about the origins and extent of our rights. They use that basis to help frame and give meaning to the exercise of a right. For this reason, key Supreme Court decisions sometimes rest on the whether and how members of the Court discern the reasons why the Founding Fathers sought to ensure the protection of particular fundamental rights.[14]

Despite this fact, courts have tended to give short shrift to the origins of the Takings Clause when deciding cases in which the protections afforded under the clause are at issue. *See* Richard Epstein, *Takings* 29 (1985) ("Historical arguments have played virtually no role in the actual interpretation of the clause."). The failure to embrace the origins of this fundamental right harms the both the Constitution and individual rights.

Where the origin of a right is known—particularly, as is the case with the Takings Clause, where the reason for enumerating the right in the Bill of Rights stems in part from British abuses of that right during the colonial period—courts should

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[14] See *McDonald v. Chicago*, 561 U.S. 742, 918-19 (2010) (Breyer, J., dissenting) (discussing "the Framers' basic *reasons* for including language in the Constitution") (emphasis in original); *District of Columbia v. Heller*, 554 U.S. 570, 662 (2008) (exploring "the reason" and "purpose for which [a] right was codified" in the Bill of Rights).

embrace that knowledge in order to give proper effect to the right. *Cf.* Ely at 2 ("[M]any provisions of the Constitution pertain to property interests and were designed to rectify abuses of the Revolutionary era."). For example, James Madison drafted the Third Amendment[15] to the U.S. Constitution as a clear reaction to violations of personal property rights in food under the Quartering Acts.[16] In the only case ever decided on Third Amendment grounds, the Second Circuit acknowledged and embraced that fact. *See Engblom v. Carey*, 677 F.2d 957, 967 (2d Cir. 1980) (noting that the Quartering Act of 1765 had required colonial tavern owners to "bear the cost of feeding" British troops).

The protections guaranteed by the Takings Clause are ancient in origin. *See* Ely at 4 ("Far from representing an innovation, the takings clause simply codified a long-standing constitutional principle upholding the right of compensation for property taken for public use.") Those origins lay in England—in Magna Carta and in the *Saltpetre Case*—and sprung from the need and desire to protect personal property rights in food. Its development continued in the New World, first in the form of the Massachusetts Body of Liberties in 1641.

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15 U.S. CONST. amend. III.

16 *See* note 11 and accompanying text. Together with the Takings Clause and the Third Amendment, the First Amendment, Second Amendment, Fourth Amendment, and Sixth Amendment each has a basis in protecting rights in food that were violated by the British before and during the American Revolution. Collectively, these rights in food are sometimes referred to as "food freedom."

When the British began to engage in systematic violations of colonists' personal property rights in food, laws and constitutional amendments that protected those rights sprang up in several states.

The Takings Clause of the Fifth Amendment extended to all Americans the protections of the compensation principle and public use requirement—an evolution that began in 1215. *See* Ely *Id.* at 18. ("The takings clause simply ratified and gave constitutional status to a long-settled principle, and generated no opposition during the ratification process.") The Takings Clause exists in the Bill of Rights in large part to protect personal property rights in food. *Cf.* Epstein at 27 ("The dominant motivation for the clause may have been the taking of food and supplies during time of war for the support of government troops.").

The protections of individual rights guaranteed under the Fifth Amendment's Takings Clause arose out of British and Colonial American acknowledgement and protection of a personal property rights in food. The language of the Takings Clause enshrined longstanding protections of personal property rights in food into the Bill of Rights. The clause was intended to ensure the new American government could not take food from private individuals and businesses for public use and without just compensation.

C. Under This Court's Jurisprudence, the Raisin Marketing Order is a Taking and Requires Just Compensation

Federal courts have long recognized the application of *per se* physical takings with regards to

personal property—often in cases pertaining to food. The origins of the raisin Marketing Order[17] that is at the heart of the instant case lies in the years immediately before and after World War II. Following World War II, the Court of Claims decided a series of cases concerning goods for which the government issued set-aside orders and reserve requirements as part of the war effort. *See Edward P. Stahel & Co. v. United States*, 78 F. Supp. 800, 804 (Ct. Cl. 1948); *Lord Mfg. Co. v. United States*, 84 F. Supp. 748, 754-55 (Ct. Cl. 1949); *Safeway Stores v. United States*, 93 F. Supp. 900, 901 (Ct. Cl. 1950); *Dore v. United States*, 97 F Supp. 239, 242 (Ct. Cl. 1951); *Arkansas Rice Growers Co-op. Ass'n v. United States*, 137 Ct. Cl. 442, 447 (1957). These cases pertained frequently to food—including meat and rice. Each involved a government order requiring a producer or handler to set aside an amount of their product, under government order, which the government would later compel the sale of for public use. In each case, the producer or handler faced steep fines for failure to comply with government mandates on sales and set-aside orders. The court in each case found that the government's actions constituted a physical taking requiring just compensation under the Fifth Amendment.

Though these cases transpired before the Supreme Court's Takings Clause jurisprudence developed specific analysis factors for *per se* takings, these cases provide examples of government action analogous to the marketing order that is at issue in

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[17] The Marketing Order is intended to regulate the country's raisin supply in an "orderly" fashion. 7 U.S.C. § 602(1).

the instant case. In those cases from the 1940s and 1950s, the Court of Claims held the government programs constituted physical takings of personal property that required just compensation. *See Dore* at 242 ("When, as here, the United States exercises its authority to order delivery and in its sovereign capacity forces the 'sale' of property to it for public use there is, in our opinion, a 'taking' and just compensation must be made."). In *Dore*, the Court noted that even though the government "did not go through the formal proceedings of requisitioning the rice," the actions taken nevertheless constituted a physical taking of the rice because the farmer faced forced sale or penalties. *Id.* In the Hornes' case, not only did they face steep penalties, but also the government required the Hornes to submit their raisins to handlers within the Raisin Administrative Committee ("RAC") to be held as reserve tonnage.[18]

The Hornes faced similar government orders as the farmers in *Dore*, though the RAC actually required more from the Hornes by demanding they give up physical control over their raisins to the government when they submitted to participating in the mandatory handler program. Although they retained title to the raisins, the title made no difference in the *Dore* or *Arkansas Rice Growers* cases because the forced submission to the government order, in face of monetary penalty, rendered the title to the property useless. *See Dore* at 242; *Arkansas Rice Growers* at 447 ("It was the mandatory nature of the set-aside order itself...

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[18] The RAC sets an annual "reserve tonnage," a percentage of the overall raisin crop. *See* 7 C.F.R. §§ 989.65–66.

which persuaded the court that the so-called sales were requisitions or takings."). Here, the government attempts to argue that the RAC never gains title to the raisins so a physical taking does not occur. However, whether or not the RAC gains title to the raisins has no bearing on their physical possession of the raisins. The Marketing Order gave the RAC the ability to control the raisins, use the raisins for collateral for loans, and dispose of the raisins, while using the proceeds from sales of the raisins to fund its own costs. *See* 7 C.F.R. §§989.66(g), 989.67(b)-(e). If the Hornes complied with the Marketing Order, they would have no control over the reserve tonnage raisins; rather they retain a minimal interest in the possible money left over from the sale of the reserve raisins—money which is neither guaranteed nor, frequently, a reality. 7 U.S.C. § 608(c)(6)(E). However, the retention of a residual share in the profits does not preclude a finding of a *per se* taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). When the government physically possesses and controls property to the extent the RAC controlled the reserve tonnage raisins, title and ownership of those raisins belongs to the government. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 431 (1982) ("Because there had been an 'actual taking of possession and control,' the taking was as clear as if the Government held full title and ownership.") (*quoting United States v. United Mine Workers*, 330 U.S. 258, 284-285 (1947) (plurality)). Such physical domination over the Hornes' raisins epitomizes a *per se* physical taking of their raisins by the government.

Declining to participate in the RAC would lead to steep penalties, leaving the Hornes with the

option either of turning over the raisins or paying the government the market value from the raisins that never entered the reserve pool. *See Horne*, 750 F.3d at 1142. Such an option is akin to the government demanding that a cattle farmer place a ten-pound portion of a cow into reserve or pay the government the corresponding market rate of steak. As in the instant case, such an arrangement would run afoul of the Takings Clause because it merely changes what the government is physically taking from the cow's owner. *See Lord Mfg. Co. v. United States*, 84 F. Supp. 748, 754-55 (Ct. Cl. 1949) ("Whether it be construed as a strongly worded order with which plaintiff reluctantly complied, or whether it be construed as a taking of private property. The net results as we see them are practically the same."). The government may refer to physical takings of personal property as marketing orders, but where raisin handlers face a mandate of physically turning over their raisins or paying the government for the value of those raisins, the government's rhetoric is akin to putting lipstick on a pig. *See Edward P Stahel & Co. v. United States*, 78 F. Supp. 800, 804 (Ct. Cl. 1948) ("To say that when the Government forbids an owner of property to make any other use of it, and requires him to sell it, upon request, to the Government... is not a taking of the property for public use, would be to make the constitutional right contingent upon the form by which the Government chose to acquire the use of the property.").

D. The Ninth Circuit Erred When it Failed to Recognize the Marketing Order as a *Per Se* Taking

At the crux of the Ninth Circuit's flawed ruling is its failure to apply a *per se* physical taking analysis to the Hornes' case, opting instead to employ the *Nollan/Dolan* analysis. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The *Nollan/Dollan* analysis applies in situations where the government restricts the use of a person's real property. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d at 1142 ("We apply the *Nollan/Dolan* rule here because we believe it serves to govern this use restriction as well as it does the land use permitting process."). The Marketing Order allows the government to take physical possession and control over the raisins. That makes a *Nollan/Dolan* analysis inapt. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Pres. Council, Inc.*, 535 U.S. 302, 322 (2002) (*citing United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)).

The RAC does not merely place a condition on the Hornes' use of their property. Rather, the RAC physically takes control of their raisins. The Ninth Circuit conflates the ability of the Hornes to grow other crops on their land with their ability to sell their raisins freely. *See Horne*, 750 F.3d at 1143 ("The Hornes, too, can avoid the reserve requirement of the Marketing Order by... planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins.").

The Marketing Order is not a condition on the use of the Hornes' land that the Hornes can simply

avoid by growing different crops. The Marketing Order controls the crops themselves, granting the RAC possession and control over the reserve tonnage raisins. The Marketing Order physically takes the reserve raisins or issues penalties for the price of the raisins, and the government cannot construe it as a use restriction on the land that would qualify for a *Nollan/Dolan* analysis.

Rather, as discussed earlier, the Marketing Order does not serve merely to limit the Hornes' use of their property; it gives them only the option of surrendering their property or paying the equivalent, and serves as a permanent government occupation of property. Consequently, the most appropriate analysis for determining whether the Marketing Order constitutes a taking of the Hornes' raisin crop is *Loretto*. But the Ninth Circuit ignores this precedent and holds that the Constitution affords less protection to personal property than it does to real property, relying on its own misinterpretation of dicta from *Lucas*. *See Horne*, 750 F.3d at 1139–40. In *Lucas*, the Court mentions that the owner of personal property should be aware of the possibility that a regulation may render his property "economically worthless." *See Lucas*, 505 U.S. 1003. 1027–28. However, *Lucas* and the jurisprudence it spawned dealt with the diminishment of economic value of property, not physical seizure of property. *See id.*

Applying such logic to a case involving physical taking of personal property is improper, and confuses the existence of the physical taking in the Hornes' case with deprivation of an economic interest in their property. Furthermore, the Court in *Loretto* noted that physical seizure of "land or real property

is an obvious fact that will rarely be subject to dispute." *Loretto*, 458 U.S. 437. Here, there can be little dispute about the government's seizure of the reserve raisins by the very nature of the government's control and possession over the raisins. Additionally, although the Ninth Circuit refused to apply the analyses in *Lucas* or *Loretto* to the Hornes' case because those cases involved real property, not personal property, the Ninth Circuit has no issue with this distinction between property types when it applied the analyses of *Nollan/Dolan* to the Hornes' case, despite both *Nollan* and *Dolan* being cases involving real property. *See Horne*, 750 F.3d at 1143-44.

While the Ninth Circuit appears to have created an artificial distinction between real and personal property that would negate some rules but not others, such a distinction is not part of this Court's jurisprudence. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164–65(1980) (holding that state retention of interest constituted a taking); *Kimball Laundry v. United States*, 338 U.S. 1, 16 (1949) (stating that a temporary government seizure of a laundry company qualified as a taking of the owner's laundry trade routes). Other circuit courts have also treated real and personal property similarly. *See Nixon v. United States*, 978 F.2d 1269, 1284-85 (D.C. Cir. 1992) ("The actual holding of *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction."). Similarly, this Court has noted, in dicta, that personal property falls expressly within the category of property that might be subject

to a *per se* taking. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n. 9 (1989).

CONCLUSION

The Fifth Amendment's Takings Clause requires that the government compensate property owners when it takes property for public use. The clause protects real and personal property. From Magna Carta to the *Saltpetre Case* to the Massachusetts Body of Liberties, the origins of and purpose for the clause lay in protecting personal property rights in food. The Hornes deserve the full protection of the Takings Clause. Consequently, the Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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